JUL 28 2004

NO. 03-1612

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IN THE

SUPREME COURT OF THE UNITED STATES

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REMIGIO I. AGUSTIN -- PETITIONER

vs.

UNITED STATES -- RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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# PETITIONER'S SUPPLEMENTAL BRIEF

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[1] See the Ashcroft slip opinion in the internet at: http://a257.g.akamaitech.net/7/257/2422/29june20041115/www.supremecourtus.gov/opinions/03pdf/03-218.pdf

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**SUPPLEMENTAL BRIEF**

Pursuant to this Court's Rule 15.8, Petitioner (or "Agustin") is hereby filing this supplemental brief.

This honorable Court should take judicial notice of, and consider, this Court's quite recent reannouncement of its constitutionally protected speech-case law in Ashcroft v. American Civil Liberties Union, 542 U.S. ____ (2004), U.S. No. 03-218 (June 29, 2004)[1] (or "Ashcroft"), ("it is important to assure that legitimate speech is not chilled or punished" (page 7 of slip opinion)), because it is relevant and controlling in Agustin's underlying ***Back Pay Act claims*** and constitutional claims:

> (a) Agustin's "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2, at App. E-27) and (b) "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA [Federal Employees' Compensation Act]" (App. E-30) [or under "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13] or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a)[1995]; 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71)). See Petition, at 9.
>
> "the Navy's infringement or violation of his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment". Item (f) at App. BB-3.

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[1] See the Ashcroft slip opinion in the internet at: http://a257.g.akamaitech.net/7/257/2422/29june20041115/www.supremecourtus.gov/opinions/03pdf/03-218.pdf

In a 4-12-95 personnel/pay action (see App. E-7 to 8), the Navy disciplined and removed Agustin based on "unavailability for duty" pursuant to Civilian Personnel Instructions "CPI 752" (App. E-4), Department of the Navy Disciplinary Actions, based solely on his "constitutionally protected conduct" (Arnett v. Kennedy, 416 U.S. 134, 163 (1974) (or "Arnett")—his exercised of his constitutionally protected, statutory and regulatory rights under our ***money-mandating*** federal statutes or regulations. See Petition, at page 8. The cause of the Navy's 4-12-95 personnel/pay action was not due to any misconduct; nor any violation of, or failure to follow, any law, rule, regulation, or policy; nor any use of alcohol or illegal drugs; nor any unapproved absence or absence without leave (AWOL), by Agustin.[2] See App. D-1 to 2. Through no fault of his own, and due to his Federal Employees' Compensation Act (FECA)-approved occupational injury, Agustin became an injured, in pain, in medical need, federal employee. See App. D-1 to D-6, and App. E-14. It is undisputed and indisputable by Respondent that the "'cause' for [Agustin's ] discharge" (Arnett, at 163) or Agustin's "unavailability for duty" (App. E-4) was "constitutionally protected conduct" (Arnett, at 163)—his exercised of his Due Process rights or liberty interests (a) to enjoy his substantive constitutional right to medical care or treatment and (b) to enjoy his FECA continuation of pay rights from 12-15-93 to 1-31-94, his FECA compensation

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[2] It is undisputed and indisputable by Respondent that from 12-14-93 (the date of Agustin's FECA-approved occupational injury) to 4-21-95 (the effective date of the Navy's 4-12-95 personnel/pay action): Agustin dutifully obeyed the laws and regulations, he has no absence without leave (AWOL) and no leave without pay (LWOP), all his absence or "unavailability for duty" (App. E-4) was all authorized or approved absence for the exercised of his Due Process rights or liberty interests (a) to medical care or treatment and (b) to enjoy his statutory and regulatory rights under our ***money-mandating*** statutes or regulations, was all authorized or approved by, and was all with the blessing of, the federal government.

rights from 2-1-94 to 1-22-95, and his 65 Statute 681, Section 204 (or sick leave) rights from 1-23-95 to 4-21-95.[3] See item 2, at App. BB-1 to BB-5.

In light of Ashcroft's command that "it is important to assure that legitimate speech is not chilled or punished" (Ashcroft, at 7), Agustin respectfully requests this Court to take judicial notice, and to consider, that "the protection of [constitutionally protected]…speech" in Virginia v. Black, 123 S. Ct. 1536, 1547 (2003) (or "Black"), and now, in Ashcroft, and the protection of "constitutionally protected conduct" in Arnett (416 U.S., at 163) and in Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (or "Coates"), have "no constitutionally significant distinction" (Franchise Tax Bd. of Cal. v. Hyatt, 123 S. Ct. 1683, 1690 (2003) (or "Hyatt")) or difference with respect to constitutional protection under our U.S. Constitution. "[I]t is important to assure that legitimate speech [or conduct] is not chilled or punished". Aschroft, at 7. The Navy's 4-12-95 personnel/pay action was void ab initio, unlawful, and/or **unconstitutional** because it "chilled or punished" (Ashcroft, at 7) constitutionally protected exercised of Due Process rights or liberty interests (a) to medical care or treatment and (b) to enjoy statutory and regulatory rights under our *money-mandating* federal statutes or regulations. Such action unconstitutionally deters or penalizes perfectly legitimate conduct. Based on Ashcroft, Black, Hyatt, Arnett, and Coates, the Navy's 4-12-95 personnel/pay action was void ab initio, unlawful, and/or **unconstitutional** because it "authorize[d] the punishment of constitutionally protected conduct".[4] Coates, 402 U.S. 611, 614 (1971). The Navy's

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[3] "[W]e have held that Congress in establishing a standard of 'cause' for discharge did not intend to include within that term any constitutionally protected conduct." Arnett, 416 U.S., at 163.

[4] In the instant case, the Navy's "ADVANCE NOTICE OF PROPOSED SEPARATION" (App. E-4 to E-5) was "a disciplinary

action **unconstitutionally** punished Agustin based solely on his "constitutionally protected conduct" (Arnett, 416 U.S., at 163)—Agustin's exercised of his Due Process rights or liberty interests (a) to medical care or treatment and (b) to enjoy his statutory and regulatory rights under our ***money-mandating*** federal statutes or regulations.

Pursuant to Federal Rules of Civil Procedures (FRCP) Rule 41(b), the District Court made "a valid and final" (Ashe, 397 U.S., at 443) Rule 41(b)-"lack of jurisdiction" judgment that it "cannot adjudicate those claims"[5] because Agustin "failed to allege these violations in his [District Court] Complaint" (App. E-30), or because Agustin "never alleged a cause of action under these statutes and regulations ["5 USC Section 8118(c); 20 C.F.R. Section 10.310(a)[1995]; 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71)]" (App. E-71). See Petition at 11 and 12. Based on this dispositive fact—the District Court's Rule 41(b)-"lack of jurisdiction" judgment over "those claims" (App. E-30), which the Claims Court and the Federal Circuit refused or failed to consider, discuss, or even mention in a quite clear travesty or miscarriage of justice, "those claims" were not, and have never been "pending"[6] (28 USC Section 1500) before the District Court, and, therefore, 28 USC Section 1500 could never apply with

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action…It's a disciplinary action as far as the Board is concerned and that's what matters." [MSPB] ADMINISTRATIVE JUDGE LEE, (quoted from lines 9, and 13 thru 14, of App. E-11). Under Webster's New Collegiate Dictionary, Copyright © 1975, "discipline" means "punishment".

[5] "[T]hose claims" (App. E-30) are those Back Pay Act claims "that the Navy violated his rights under 5 USC Section 6307 and/or FECA" (App. E-30), [or "under 5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13], or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a)[1995]; 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71).

[6] See the meaning of "pending" at App. SC4-1.

respect to "those claims" (App. E-30). Then, the District Court refused or failed to transfer "those [Back Pay Act] claims" (App. E-30) and his constitutional claims to the Claims Court pursuant to 28 USC Section 1406(a) or 28 USC Section 1631.

In the District Court, in the Claims Court, and in the Federal Circuit, there was ***no*** **fair and full hearing and adjudication of the merits of "those claims" (App. E-30) *based on the Tucker Act and the Back Pay Act***. Whether it is before the Claims Court, the Federal Circuit, or before this honorable Court, **Agustin has a *guaranteed*, First Amendment right "to petition" our federal courts for the interpretation and/or enforcement of the Back Pay Act and a *guaranteed* Fifth Amendment "due process" right** to *truly* have his day in *some* federal court with respect to the merits of his timely-filed and judicially cognizable ***Back Pay Act claims*** and constitutional claims, and he is again hereby invoking such rights. See Petition, at 27.

**To date, in an ongoing cruel and unusual injustice, no federal court has given or accorded Agustin his *guaranteed*, First Amendment right "to petition" our federal courts for the interpretation and/or enforcement of the Back Pay Act and his *guaranteed* Fifth Amendment "due process" right to a fair and full hearing and adjudication of the merits of "those claims" (App. E-30) *based on the Tucker Act and the Back Pay Act***, (not based on the Civil Service Reform Act (CSRA), nor the Rehabilitation Act, nor Title VII).[7] See App. J-1 to 2.

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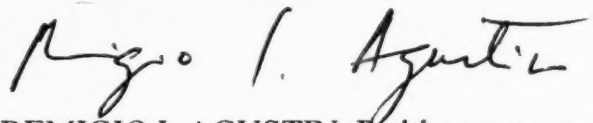
[7] "In its First and Fifth Amendments-violative, ***no-justice*** Order (App. B-1 to 8), the Claims Court refused or failed to consider, discuss, or even mention the Tucker Act and the Back Pay Act which Agustin has duly presented." Petition, at 27. Compare App. J-1 to 2. In the Claims Court, there was ***no justice***—no "judicial review" (Estep v. U.S., 327 U.S. 114, 120 (1946))—no consideration, nor discussion, nor mention of

Agustin again submits that **the CSRA and the Back Pay Act "are capable of coexistence"** (Mancari, 417 U.S., at 551, (bold and underline added)), and that these two "'statutes do not pose an either-or proposition' where each confers jurisdiction over cases that the other does not reach" (J.E.M., 122 S. Ct., at 605, (quoting Germain, 503 U. S., at 253)). The Navy's 4-12-95 personnel/pay action, which violated our ***money-mandating*** federal statutes or regulations and Agustin's rights pursuant to the said ***money-mandating*** authorities was void ab initio, unlawful, and/or unconstitutional; such violations are covered under the Tucker Act and the Back Pay Act; and the Claims Court has jurisdiction over "those claims" (App. E-30) which the CSRA "does not reach" (J.E.M., id., at 605).

Respectfully submitted, through, and with help and assistance from friends,



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the Tucker Act and the Back Pay Act upon which Agustin's claims are founded and upon which relief could be granted. And in the Claims Court and in the Federal Circuit, there was ***no justice***—no "judicial review" (id.)—no consideration, nor discussion, nor mention of FRCP Rule 41(b) and the Due Process controlling effect and federal *res judicata* effect of the District Court's dispositive and quite controlling, Rule 41(b)-"lack of jurisdiction" rulings over "those claims" (App. E-30), which Agustin has duly presented before both courts.